

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

*Petitioner,*

v.

JAMES A. LYNAUGH,  
Director, Texas Department  
of Corrections,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF BILLY CONN GARDNER  
AS AMICUS CURIAE FOR PETITIONER**

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## INTEREST OF THE AMICUS <sup>1</sup>

Amicus curiae, Billy Conn Gardner, is a person sentenced to death in the State of Texas. He has an interest in Mr. Penry's case, because he too was sentenced to death in a proceeding in which his mitigating evidence could not be given mitigating effect. His mitigating evidence was not mental retardation as in Mr. Penry's case. His mitigating evidence was an involuntary and profound addiction to heroin and other drugs since the age of nine (when he was injected by a cousin), the suffering of severe physical and emotional abuse as a child, and strength of character. As with Mr. Penry's mental retardation, however, Mr. Gardner's mitigating evidence "had relevance to

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<sup>1</sup> Amicus files this brief by written consent of both parties pursuant to Rule 36.2 of the Rules of the Court. The parties' letters of consent are on file with the Clerk of the Court.

[his] moral culpability beyond the scope of the special verdict questions [given the jury in his case]." Franklin v. Lynaugh, \_\_\_ U.S. \_\_\_, 101 L.Ed.2d 155, 173 (1988) (O'Connor, J., joined by Blackmun, J., concurring).

Mr. Gardner submits this brief because he believes his analysis of the Franklin issue in Mr. Penry's case can be of help to the Court. Further, because he is directly and personally interested in the Court's clarification of the rights recognized by five members of the Court in Franklin, see pages 18 - 21, infra, he submits this brief to urge the Court to address the Franklin issue, and not avoid it by deciding the broader mental retardation issue presented by Question Two in the petition for writ of certiorari in Mr. Penry's favor. As set forth in point II of his argument, the rights

seemingly established by Franklin need further clarification, Mr. Penry's case is a proper vehicle for such clarification, and the only way to assure that Mr. Penry's case will provide the needed clarification is to decide the Franklin issue.

#### STATEMENT OF THE CASE

Johnny Paul Penry was convicted and sentenced to death for the rape-murder of Pam Carpenter on October 25, 1979, in Livingston, Texas. At the guilt-innocence phase of the trial, Mr. Penry relied entirely upon an insanity defense, which centered upon his mental retardation. He presented evidence of his history of retardation, its effects on his thinking and behavior, and the history of abusive treatment by his parents which worsened

the effects of retardation. (R. 2129-2321).<sup>2</sup>

In the sentencing phase of the trial which began immediately thereafter, the State focused solely upon proving that the homicide was "deliberate," that Mr. Penry presented a risk of future dangerousness, and that his homicidal behavior was not provoked by the victim -- the "special verdict questions" to be answered by the sentencer under Texas' capital sentencing scheme. The defense did not respond to these issues, but instead, urged the jury to impose a life sentence because of Mr. Penry's retardation.

The State relied primarily upon expert testimony concerning the characteristics of Mr. Penry's mental

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<sup>2</sup> References to the trial record, consisting of twenty-one volumes numbered sequentially, will be to "R," followed by the appropriate page numbers.

disorder. The State argued that whether the disorder was mental retardation alone, as Mr. Penry's experts believed, or a combination of mental retardation and antisocial personality, as the State's experts believed, its effects were the same: it caused Mr. Penry to act on his impulses, to make no effort to constrain his impulsive behavior, and to act impulsively time and time again despite any punishment for the same impulsive behaviors. For this reason, the State's experts were able to conclude, as one of them had concluded in 1977 in connection with a then-pending rape charge against Mr. Penry: "'that he is dangerous and does constitute a threat to society and will continue to do so, whenever he's free in society.'" (R. 2548). See generally R. 2541-61.

To bolster the experts' opinions, the State introduced evidence of Mr. Penry's history of rape and attempted rape. The only other rape with which he had been charged occurred in 1977. He was convicted and sentenced to a term of two to five years. (R. 2571-72). Following his arrest for the murder of Pam Carpenter, Mr. Penry confessed to two other attempted rapes. (R. 2609-26, 2640-41).

The defense presented only two additional witnesses during the sentencing proceeding. One presented evidence raising a question about Mr. Penry's involvement in one of the attempted rapes to which he had confessed. (R. 2643-50). The other testified that he was a good church member. (R. 2653).

At the close of the sentencing phase evidence, the court instructed the jury to

answer the following questions "yes" or "no" after taking into account "all of the evidence submitted to you in the full trial of the case":

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(R.117-118A).

Prior to the giving of the instructions, Mr. Penry objected on several grounds material to the issues before this Court. He objected to the submission of the case to the jury as a capital punishment case since the imposition of a death sentence upon Mr. Penry would be cruel and unusual in light of his "mental illness and condition." (R. 2662). He objected to the absence of an instruction requiring the sentence to be imposed on the basis of a weighing of aggravating and mitigating circumstances. (R. 2661-62, 2664). And he objected, "because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances." (R. 2662). The court overruled each of these objections.

In the State's initial closing argument thereafter, the entire focus was on the three special issues. The State argued that deliberateness was shown by virtue of Mr. Penry's killing the victim after she was rendered helpless and by virtue of the confessions, in which Mr. Penry said that he intentionally killed the victim. (R. 2667-68). Future dangerousness was shown by Mr. Penry's history of rape and attempted rape and by the expert testimony concerning his mental disorder. (R. 2668). Finally, the State argued that the murder did not occur in response to provocation by the victim but occurred instead, as a result of Mr. Penry's belief that he would be caught and sent to prison if he did not kill her. (R. 2667).

The defense closing arguments focused almost entirely upon Mr. Penry's

retardation. Counsel initially made an effort to tie retardation to the special verdict issues even though he could not suggest how the evidence of retardation might reasonably lead the jury to answer any of the issues "no":

I think also there's been a lot of evidence here about Johnny Paul Penry's mental condition and mental state. Certainly you have to believe that his mental state was not healthy. He's mentally ill. Certainly you know that his environment played a part in this. Think about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them.

(R. 2681).

Thereafter, defense counsel made no pretense that the evidence of retardation could logically call for a "no" answer to any of the special issues. Instead, he argued that Mr. Penry's retardation -- independent of the special verdict issues -- called for the jury to impose a life

sentence by answering "no" to any one of the issues:

You know that if you answer any one of these issues no then it is mandatory life.... The records reflect that this boy had an afflicted mind at the age of nine and we can't get around that. The records reflect that later on when he went to school up there for three years[,] he was taken out by his parents who ... [brought] him back into the environment where his mental condition would be worsened by the treatment that he no doubt received. And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience .... I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer.

(R. 2683-84).

In the course of making this argument, counsel did not contend

seriously that Mr. Penry's retardation rebutted the evidence presented by the State in support of any of the special verdict questions. Indeed, he conceded that Mr. Penry "in all reasonable probability will continue to get into trouble." (R. 2685). His argument instead was that this did not matter, for "a boy with this mentality, with this mental affliction," should not be put to death. (Id.)

In rebuttal, the prosecutor acknowledged that defense counsel's argument was appealing: "[T]his is the type of subject that can be used to easily move you emotionally. It would move anyone, and I think there would be something wrong with you, if you weren't at least concerned." (R. 2690). However, he then dismissed the argument as wholly

irrelevant and improper to the task facing the jury:

But, ladies and gentlemen, your job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence you have heard in this courtroom, then answer those questions accordingly.

(R. 2690). Continuing, the prosecutor explained that the defense argument did not present any proper basis upon which the jury could answer any of the special verdict issues "no."

In answering these questions based on the evidence and following the law, and that's all that I asked you to do, [your job] is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason that you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case,

because, ladies and gentlemen, I submit to you we've met our burden.

(R. 2689-90)

Thereafter, the jury returned a verdict answering all of the special verdict issues "yes," (R. 2698-99), and the court imposed a sentence of death in accord with the verdict. (R. 2708-09).

#### SUMMARY OF ARGUMENT

In proffering evidence of his mental retardation as a mitigating circumstance, Mr. Penry "introduced mitigating evidence" that "had relevance to [his] moral culpability beyond the scope of the special verdict questions...." Franklin v. Lynaugh, \_\_\_U.S.\_\_\_, 101 L.Ed.2d 155, 173 (1988) (O'Connor, J., joined by Blackmun, J., concurring). The defense argued that death was too harsh a punishment for a mentally retarded person like Mr. Penry. However, the prosecution

argued that the special verdict questions could not be answered honestly in the negative because of his retardation. Instead, the evidence of his retardation supported an affirmative answer to each question. Mr. Penry's jury was thus caught in the unconstitutional bind identified by the concurring and dissenting justices in Franklin v. Lynaugh: it was presented with evidence which called for a life sentence but which, at the same time, supported affirmative answers to each of the special verdict questions. In these circumstances, the instructions which permitted the jury only to answer the special questions, "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 101 L.Ed.2d at 173 (concurring opinion). The Eighth Amendment cannot tolerate the

imposition of a death sentence in these circumstances.

Even though five Justices recognized in Franklin that the Texas death penalty statute could operate unconstitutionally -- in the way we now know it did in Mr. Penry's case -- only three Justices found that it operated unconstitutionally in Mr. Franklin's case. The result has been that the rights recognized in Franklin are still uncertain and insecure. To resolve this uncertainty, the Court needs to decide a Franklin issue in a case in which the unconstitutional application of the Texas statute is manifest. Mr. Penry's case is such a case. However, Mr. Penry's case also presents a broader constitutional question: whether the mentally retarded should ever be eligible for the sentence of death. While the Court should decide this issue and should

decide it in favor of precluding death for the retarded, it should not decide that issue in Mr. Penry's case. If it does, it will have no need to reach the Franklin issue, and the uncertainty surrounding that issue will be left unresolved. For these reasons, and for the additional reason that the Franklin issue is the narrower issue -- and the Court has long sought "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) -- the Court should decide the Franklin issue and leave the broader mental retardation issue to another day.

ARGUMENT

## I.

THE JURY THAT SENTENCED JOHNNY PENRY TO DEATH WAS NOT GIVEN THE AUTHORITY TO REJECT IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF ITS CONSIDERATION OF HIS MENTAL RETARDATION, IN VIOLATION OF THE EIGHTH AMENDMENT RULE OF LOCKETT V. OHIO, 438 U.S. 586 (1978)

In Franklin v. Lynaugh, \_\_\_ U.S. \_\_\_, 101 L.Ed.2d 155 (1988), five Justices of the Court recognized that the Texas capital sentencing scheme can preclude the constitutionally necessary consideration of mitigating circumstances. 101 L.Ed.2d at 172-73 (O'Connor, J., joined by Blackmun, J., concurring); id. at 177-79 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). All five Justices agreed that under the Eighth Amendment capital sentencers must be permitted not only to consider any relevant mitigating evidence but also to

give effect to that evidence by deciding not to impose a death sentence.<sup>3</sup> In the view of these Justices, the Texas capital sentencing process can in certain cases prevent the jury from giving effect to its consideration of mitigating evidence. As Justice O'Connor explained,

Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence

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<sup>3</sup> Id. at 172-73 (concurring opinion) ("it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty[;] ... [t]he right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration"); id. at 177 (dissenting opinion) ("[a] sentencing jury must be given authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or circumstances of the offense proffered by the defendant in support of a sentence less than death").

introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

101 L.Ed.2d at 173. Accord, 101 L.Ed.2d at 177-78 (dissenting opinion).

Johnny Penry's case is the kind of case in which the Texas sentencing scheme did preclude the jury from giving effect to its consideration of mitigating evidence. In introducing evidence of his mental retardation, Mr. Penry "introduced

mitigating evidence" that "had relevance to [his] moral culpability beyond the scope of the special verdict questions." Because this evidence nevertheless supported affirmative answers to the special verdict questions, and because the sentencing phase instructions did not authorize the jury to give effect to the mitigating aspects of this evidence, there was a very substantial risk that the jurors did not believe they could give mitigating effect to their consideration of Mr. Penry's evidence of mental retardation. In these circumstances, Mr. Penry's sentencing proceeding violated the Eighth Amendment.

A. Mr. Penry's Mitigating Evidence -- His Mental Retardation -- Had Relevance Beyond the Scope Of The Special Verdict Questions

The evidence of Johnny Penry's mental retardation was the primary evidence proffered in mitigation at his trial. His

counsel did not seriously argue that it provided a logical basis for answering any of the special verdict questions "no," yet they argued vigorously that it was a compelling reason not to impose the death sentence. If, notwithstanding counsel's argument, this evidence could have provided a logical basis for answering one or more of the special verdict questions "no," "the jury was free to give effect to that evidence." Franklin, 101 L.Ed.2d at 173 (concurring opinion). Accordingly, the evidence of mental retardation must be carefully analyzed to determine its relationship to the special verdict questions.

1. Johnny Penry's History of Mental Retardation And Its Effects On His Behavior

Johnny Paul Penry was twenty-three years old at the time that he killed Pam Carpenter. (R. 2137). However, he

functioned in a far more limited way than most twenty-three-year olds. Intellectually, he reasoned and made decisions more like a six- or seven-year-old-child. (R. 568). Behaviorally, he took care of himself and related to others more like a nine- to ten-year-old child. (R. 568-69).

Johnny Penry functioned like this because he is mentally retarded, and has been for his entire life. He has consistently scored in the range of 50 to 63 on standardized intellectual (IQ) tests and has demonstrated a comparable deficiency in "adaptive behavior." (R. 568-69, 2140-53, 2377, 2379). As an expert for the State explained, mental retardation involves deficiencies in both intellectual functioning and adaptive behavior, or "day-to-day" functioning, i.e., "what goes on with himself and with

... the social environment." (R. 2334).<sup>4</sup> Mr. Penry has demonstrated marked deficiencies in intellectual functioning and adaptive behavior throughout his life.

From the time he was old enough to start school, Johnny could not function like most other children his age. As his mother explained, "I couldn't keep him in a public school. He didn't have the learning capacity that the other children had, and the teachers said they just couldn't cope with him. They couldn't teach him like the other children." (R.

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<sup>4</sup> The leading professional organization in the field of mental retardation, the American Association on Mental Retardation (formerly the American Association on Mental Deficiency), defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." AAMD, Classification in Mental Retardation 1 (H. Grossman, ed., 1983). "[A]daptive behavior refers to what people do to take care of themselves and to relate to others in daily living rather than the abstract potential implied by intelligence." Id. at 42 (emphasis supplied).

2239). As a result, his parents placed him in a private school with a special class for mentally retarded children. (R. 2239-40). Johnny made no academic progress in three years at that school (R. 2239-43), so his parents turned to a diagnostic center at the University of Texas for help.

By this time, Johnny was presenting serious problems at home as well. He began "prowling" around the neighborhood at night (R. 2244), so his parents covered the windows in his bedroom with plywood and locked him into the room at night (with a lock on the outside of his door). Id. Sometimes he was locked in the bedroom during daytime hours as well. (R. 2277). During the time he was locked in his bedroom -- at night or in the daytime -- he was generally left unattended.

(R. 2277). Without access to a bathroom, he would go the bathroom in his clothes, then stuff his soiled clothes into holes that he made in his bedroom walls. (R. 2247).

His interactions with his siblings were often inappropriate. For example, his mother once found him "picking all the skin from his [baby brother's] feet with a straight pin" (R. 2245); he "smeared ... dog stuff [feces]" over his siblings' cookies on another occasion (R. 2246); and "he would pick scabs off the other kids and off of himself and eat them" (R. 2246-47).

Thus, when Johnny's parents took him to the University of Texas Medical Branch at Galveston in July, 1965, when he was nine years old, staff of the Medical Branch noted that Johnny often behaved in an inappropriate and bizarre manner and

had great difficulty in social interactions:

Mrs. Penry has to keep John in a locked, bare room at night in order to keep him in, and he requires constant supervision during the day. He shows destructive tendencies in that he has always torn up his toys, including a tricycle and a metal wagon. Mrs. Penry stated that John is changeable in his moods, often loving and kind to his siblings, but more than likely is aggressive toward them, especially toward the three-year old boy whom he hits and bites. Mrs. Penry does not leave John alone with their three-year old for fear that John will harm him. John's behavior has included setting fire to a friend's bathroom while he was in her care; climbing the flagpole at school; jabbing girls in the classroom with a newly sharpened pencil; and staying out in the rain and resisting the teacher's attempts to get him in. He also wanders out of the classroom and plays with the water in the toilet.

DX 8, at 3.<sup>5</sup>

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<sup>5</sup> Defendant's trial exhibits will hereafter be referred to as "DX," followed by the exhibit number. The first reference to a particular exhibit will also note the page number

Psychological testing "reveal[ed] fairly severe retardation with a total IQ of just over 50," and "[i]t also revealed marked evidence of classic organic brain damage." DX 8, at 6.

Doctors at the Medical Branch recommended that Johnny be placed in a state school for the mentally retarded. DX 8, at 6-8. In keeping with this recommendation, Johnny was a resident in the Austin State School for a few months. DX 4 (admitted, R. 2125). His parents resisted his institutionalization however, so he did not stay there any longer. (R. 2241).

In 1968, when Johnny was twelve, his parents again placed him in a state school for a period of several months, this time the Mexia State School. See DX 3

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in the trial record where the exhibit was admitted into evidence

(admitted, R. 2125). In the intake interview at the school, a caseworker noted that his parents were not forthcoming about their treatment of Johnny, and that their behavior during the interview raised troublesome questions about their relationship with him:

Throughout the interview both parents seemed reluctant to discuss their true problems and evaded direct questions concerning their relationship with subject. The father was greatly concerned about subject's religious training as a Jehovah's Witness and had difficulty in controlling his emotions (his lips quivered and eyes filled with tears) as he quoted scripture and explained his beliefs. The mother, though never removing her dark sun shades, wept frequently throughout the interview and had very little to say. Both parents were rigid when parting with subject, and showed no affection. The mother did not say anything to the subject, but hurriedly went to the car, crying and sobbing aloud for a few seconds. I got the impression that she felt this was expected of her.

DX 3, at 5. Staff at Mexia State School later confirmed this caseworker's suspicions, for "[a] few days after admission, when [Johnny's] hair was cut, it was discovered he had many small scars over his head." Id. When Johnny was asked how he had gotten these scars, "he said they were from cuts made by a large belt buckle which his mother used when whipping him." Id.

This history was confirmed at trial by Johnny's sister Trudy. (R. 2279). The parental abuse that it signified, however, was far worse than the "many small scars over [Johnny's] head" might suggest. As subsequent medical records revealed, Johnny was tortured, not nurtured, by his parents:

Past history obtained from his two sisters ... reveals that Johnny was termed by his mother as 'brain damaged' since birth; however, there was a serious history of child abuse from very

early on. The sisters state that the mother threw Johnny about the room whenever he cried as early as 9 months old and at least on one [o]ccasion broke one of his arms. Since Johnny was brain damaged the mother locked him in a dark room where he remained for many years. There was evidence of having been beaten severely and scars were left on his back and both legs. He was forced to kneel on sharp objects as punishment; his mother burned him with cigarettes for punishment. On one occasion ... she threatened to castrate him for continued bed-wetting and obtained a knife to do this with.

DX 7 (admitted, R. 2125), at 4.<sup>6</sup> Not surprisingly, for as long as his sister could remember, Johnny "always would act afraid [,] ... [a]fraid of the dark ... [and] afraid of people." (R. 2279-80). And as a medical report observed in 1973, "[Johnny] has slept with a knife under his

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<sup>6</sup> This history was recorded by staff at the Austin State Hospital in September, 1973, where Johnny was evaluated in connection with a charge of arson. He was seventeen years old at that time.

pillow because he was terrified that his mother would come and get him...." DX 6 (admitted, R. 2125), at 2.<sup>7</sup>

The effects of parental abuse were particularly devastating for Johnny. During the time he resided at Mexia State School (when he was twelve), his IQ was measured at 51. Nevertheless, there was still hope for the future. As noted in a Mexia psychological evaluation after his admission, "In view of his intellectual level, it is likely that he will profit from academic training. In addition, it is likely that he could become self-sustaining in the future with proper supervision and training." DX 3, at 2. This hope for Johnny's future was dashed when, after several months at Mexia, he

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<sup>7</sup> DX 6 is the medical record from Rusk State Hospital, the institution to which Johnny was committed for three months after the evaluation in September, 1973 at Austin State Hospital.

was removed by his father. As a later medical record reported, "[Johnny's] father brought him home for a visit and upon learning that Johnny was homosexual thought that the Mexia State School was responsible for this and would not return him." DX 7, at 4.

Johnny's removal from Mexia State School at the age of twelve put an end to this early forecast that he might "profit from academic training" or "become self-sustaining ... with proper supervision and training." DX 3, at 2. He returned to the abusive household from which he had come, where he was "always afraid." In addition to the longstanding abusive dynamics of the household, upon his return Johnny was exposed to yet another kind of abuse. As a result of his exposure to homosexual abuse in Mexia State School, he became vulnerable to repeated sexual

abuse. For the next several years, this became another form of mistreatment in Johnny's already abusive daily life. Thus, by September, 1973, when Johnny was seventeen, his medical record noted that "[h]e has had a long history of being sexually exploited by older and more intelligent homosexuals." DX 5, at 7.

This life-long history of multiple forms of abuse made it impossible for this young man, already handicapped by mental retardation, to adjust appropriately to his environment. Throughout his adolescent years, Johnny had to be continually supervised by adults, see R. 2297 (testimony of Jasper Jones); R. 2307-2312 (testimony of Patsy Ross), and to the extent that he socialized at all, he played with much younger children, who ranged from six to nine years old. (R. 2265-66). Thus, by the time Johnny was

seventeen, a psychological evaluation observed, "In light of his social history, retardation has apparently been greatly magnified by a grossly impoverished developmental and environmental background." DX 6, at 6.

Nearly four years later, on July 25, 1977, Johnny was convicted of rape. (R. 2571). The same psychiatrist who would later testify for the state in the instant case, Dr. Felix Peebles, evaluated him in connection with this charge and found that "he is moderately retarded and his judgment and insight are moderately to severely impaired." State's Exhibit 59 (admitted, R. 2160), at 3.<sup>8</sup> Dr. Peebles

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<sup>8</sup> Degrees of mental retardation are classified by the American Association on Mental Retardation in four categories: mild, moderate, severe and profound. Classification in Mental Retardation, supra, at 13. The largest number of mentally retarded people, about 89 percent, are classified in the "mild" category. See Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 423 (1985).

explained that "[a] person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately.... He has also not learned from his mistakes and is likely to continue making some of his same mistakes over again." Id. at 3-4.

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Despite the optimistic connotation of the term "moderate," a person who suffers this degree of retardation in fact has a severe mental deficiency found in less than 10-15 percent of the mentally retarded population. The intellectual capacity of a "moderately" retarded adult reaches a peak at a level comparable to an average eight-year-old child. Classification in Mental Retardation, supra, at 32-33. The only levels of retardation more severe than that assessed for Mr. Penry are "severe," in which maximum intellectual capacity is comparable to a three- to five-year-old child, and "profound," in which the mentally retarded individual is found to be infantile, often existing in a catatonic or other non-interactive state. Id. The degree of disability for severely or profoundly retarded persons is so great that these persons are not likely to be involved in murders. They generally reside in institutions and are not capable of the mentation or the behavior necessary for such acts.

These features of Johnny's retardation affected him throughout his life. At the trial, they were strikingly illustrated by two examples provided by Johnny's aunt, Patsy Ross, who lived in Johnny's father's home and who helped care for Johnny after his father removed him from Mexia State School.

Ms. Ross explained that she worked with Johnny for nearly a year when he was fourteen or fifteen trying to teach him to write his name. Working "[e]very day[,] [a] little time every day[,] [r]epetitiously" (R. 2309), for a year, Ms. Ross was able to teach Johnny to print his name. But even then, "he couldn't spell it correctly," and "he could print it, but he couldn't write it." (R. 2308).

Ms. Ross also explained how she tried to enlist Johnny's help in hoeing the weeds in her garden. "I wanted him to hoe

the weeds, but lots of times he'd hoe the flowers and leave the weeds. He couldn't recognize it for a long time unless I just pointed it out absolutely and stood right over him and [said] 'that's what you don't chop down.'" (R. 2311). No matter how hard Ms. Ross tried to teach Johnny, he still made the same mistake. "If I turned my back on him, he was going to do what he wanted to do. If he was going to chop, he was going to chop what he wanted to chop. There was no way out of that. Lost a lot of flowers that way." (R. 2312).

2. The Mitigating Value of Mr. Penry's Retardation Was Not Capable Of Being Considered Within The Statutory Framework

Mr. Penry's conduct at the time of the crime was significantly influenced by his retardation. Accordingly, his retardation could have led reasonable jurors to believe that he should not be

sentenced to death. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse...." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). See also Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) ("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice[;] ... [e]vidence concerning the defendant's ... emotional history thus bear[s] directly on the fundamental justice of imposing capital punishment"). This belief certainly could have been held by some of

Mr. Penry's jurors and could have led them to believe that death was too harsh a sentence. The entire thrust of defense counsel's arguments was directed to this belief. However, as the prosecutors' arguments so clearly pointed out, the special verdict questions that the jury had to answer in order to determine Mr. Penry's sentence could not be answered honestly in the negative because of his retardation. Instead, the evidence of his retardation supported an affirmative answer to each question.

Mr. Penry's jury was thus caught in the unconstitutional bind identified by the concurring and dissenting justices in Franklin v. Lynaugh: it was presented with evidence which called for a life sentence but which, at the same time, supported affirmative answers to each of the special verdict questions. In these

circumstances, the instructions which permitted the jury only to answer the special questions, "provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 101 L.Ed.2d at 173 (concurring opinion). To appreciate the bind in which Mr. Penry's jury thus found itself, one must examine first the relationship between Mr. Penry's retardation and the offense and then the relationship between his retardation and the special verdict questions.

The disabilities persistently suffered by Mr. Penry because of his retardation -- his profound social isolation, his mis-comprehension of the external world, his acting on impulses without the intervention of appropriate social judgment, his inability to learn from past experience, his inability to modify his behavior on the basis of his

present experience, his severely limited repertoire of adaptive behaviors, and his limited moral judgment -- all played a role in the murder of Pam Carpenter.

Johnny first took note of Ms. Carpenter when he helped an acquaintance deliver some appliances to her house in early October, 1979. He later told police he immediately felt attracted to her. Upon seeing her, he "remember[ed] that [he] had seen [her] downtown before and liked her looks." (R. 2023). Johnny did not act on these feelings this time. Three weeks later, however, he saw another woman who reminded him of Pam Carpenter, and he suddenly decided that he would go to Ms. Carpenter's house to try to have sex with her. (R. 2023).

This simple course of events itself reveals the multiple effects of Johnny's disability. Taking socially appropriate

action in response to powerful human desires is a very complex task, a task for which Johnny was ill-suited by his retardation and his life experiences. Johnny's most meaningful, and primary, social interactions were with six- to nine-year-old children. In his social interactions with adults, Johnny was persistently abused, tortured, and forcibly isolated. Thus, he had no role models from whom to learn -- even at his very slow rate -- the elements of socially appropriate adult relationship. Because of his limited intellectual ability, it was very difficult for him to empathize, to perceive another's feelings and to treat that person with respect for her feelings. And because of his severely restricted repertoire of adaptive behaviors, he was unable to see alternatives for action in relation to his

strong feelings about Ms. Carpenter. When Johnny went to Ms. Carpenter's house and pushed his way through the door in order to have sex with her, he thus lacked the basic behavioral and intellectual tools taken for granted by most members of society. What happened thereafter was as much a product of these significant deficits as his initial decision to go there.

When Johnny pushed his way into Ms. Carpenter's house and began to assault her, she resisted. She fought him and stabbed him with a pair of her scissors, but he was not deterred. He was driven by his desire for her, and was unable to vary from his plan. Like the many times Johnny hoed flowers instead of weeds in his aunt's garden, "he was going to do what he wanted to do.... There was no way out of that." (R. 2312). His abilities to

empathize and to modify his behavior on the basis of its impact on another person were simply too limited. For these reasons, Johnny continued his assault upon Ms. Carpenter until he had the sexual liaison that he desired.

The assault upon Ms. Carpenter did not stop at this point, however. Johnny picked up the scissors with which Ms. Carpenter had previously stabbed him, and stabbed her in the chest. As he recounted in one of his confessions, "I told her that I was going to kill her and that I hated to but I thought she would squeal on me." (R. 2028).<sup>9</sup> Whether these words or

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<sup>9</sup> Mr. Penry's purported confessions were seriously questioned by the defense psychiatrist, Dr. Jose Garcia. Upon reviewing the written confessions, which were admittedly written by the police, and supposedly read back to Mr. Penry and approved by him, Dr. Garcia questioned their integrity:

The concept of time, the language, there is no way that a person with the demonstrated intellectual capacity [of Mr. Penry] is capable

concepts were truly those of Johnny Penry or of the police, his behavior in stabbing Ms. Carpenter was the product of mental retardation.

At some level, Johnny was aware that his assault upon Ms. Carpenter was something that others might be angry about. Whenever he had done things in the past that made his parents angry, he was treated very harshly: he was locked in a dark room for hours, he was beaten severely, he was forced to kneel on sharp objects, and he was burned with

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of using that type of syntax, that type of language, that type of sentence organization. There is no way that this can be language obtained from the person unless somebody read it and purportedly he agreed that that's what he said and signed it.

(R. 2205). Dr. Garcia's suspicions were well-founded for "[m]any persons with mental retardation ... have a particular susceptibility to perceived authority figures and will seek the approval of these individuals even when it requires giving an incorrect answer." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. at 431-32.

cigarettes. Thus, Johnny knew that when he did things that made people angry, they hurt him. He was profoundly afraid of what could happen when he made people like his parents angry. Faced with this fear again after assaulting Ms. Carpenter, Johnny reacted -- out of a desire to protect himself from being hurt -- by killing her. A nonretarded person in Johnny's situation probably would have been motivated as well to avoid what he knew could be the consequences for assaulting Ms. Carpenter. But to that person, a much broader array of avoidance behaviors would have been apparent. To Johnny, however, whose repertoire of adaptive behaviors was very small, whose ability to empathize was extremely limited, and whose fear of being tortured and hurt was overwhelming, the only

alternative he could perceive was to kill the person who would tell on him.

Even though some of Mr. Penry's jurors might have been persuaded that the relationship between his retardation and his offense called for a life sentence, when they examined the relationship between his retardation and the special verdict questions, they would have found no way in which to give effect to their belief that he should be sentenced to life. When the evidence of Mr. Penry's retardation was squeezed into the framework established by the special verdict questions, the mitigating character of the evidence was culled away. The aggravating qualities of the evidence could be considered, but the mitigating qualities could not be.

The first special verdict question asked whether the murder was committed

"deliberately and with the reasonable expectation that the death of the deceased ... would result." Mr. Penry purportedly confessed that he intended to kill Ms. Carpenter, and he expected that she would die when he stabbed her. As we have shown, his mental retardation plainly contributed to the formation of the mental state of "deliberateness." The fear that he would be hurt for raping Ms. Carpenter, the inability to empathize with her and to recognize and respect her right to live, and the inability to choose other adaptive behaviors, were all a product of his retardation, and these factors led him to commit a deliberate killing. In part because of the contribution of Mr. Penry's retardation to his mental state, therefore, the jury had little choice but to answer the first special verdict question "yes."

The second special verdict question asked whether there was "a probability" that Mr. Penry "would commit criminal acts of violence that would constitute a continuing threat to society." The evidence showed that Mr. Penry had been convicted of rape once before and that he had raped or attempted to rape several other women before he raped and killed Ms. Carpenter. More importantly, the evidence concerning his mental retardation and his life-long history of abuse by others showed that he was more likely to commit such crimes again than someone who was not so disabled. His retardation made it terribly difficult for him not to act upon the powerful emotional drives that everyone feels, and prevented him from engaging in socially appropriate behaviors in response to those drives. In addition, it made it almost impossible for him to

learn from his past transgressions. Without the proper supportive environment -- which he never had -- Mr. Penry was virtually doomed to repeat his past mistakes. Thus, his retardation supported, rather than negated, a finding of future dangerousness. In major part because his mental retardation and life history made him susceptible to committing future acts like this one, the jury had little choice but to answer the second special verdict question "yes."

As with the first and second special verdict questions, Mr. Penry's mental retardation also supported, rather than negated, a "yes" answer to the third special verdict question. This question asked whether "the conduct of the defendant ... in killing ... the deceased [was] unreasonable in response to the provocation, if any, by the deceased."

Mr. Penry's homicidal conduct plainly was unreasonable in response to any provocation. He did not kill Ms. Carpenter in the course of the fight he had with her, during which she stabbed him. (R. 2025-26). Rather, he killed her after raping her and after any struggle had ended. By his account, he killed her solely because he was afraid she would tell on him. As we have noted, Mr. Penry's retardation contributed substantially to his motivation for killing Ms. Carpenter. That his motivation for killing her was a product of retardation, however, in no way diminished the unreasonableness of the killing "in response to any provocation ... by the deceased." Accordingly, as with the other special verdict questions, the jury had little choice but to answer the third question "yes."

B. A Reasonable Juror Could Have Believed, Under The Instructions Given, That The Evidence of Mental Retardation Could Not Serve As An Independent Basis For Rejecting Imposition Of The Death Sentence

As we have demonstrated, reasonable jurors could have found that Mr. Penry's evidence of mental retardation could not be considered as mitigating under any of the special verdict questions. If those jurors nevertheless believed that the evidence of mental retardation warranted rejection of the death penalty -- as they reasonably could have, see California v. Brown; Skipper v. South Carolina -- what could such a juror do?

The defense urged such jurors to answer any of the special verdict questions "no," even though an honest and straightforward answer to each of the questions would have been "yes." Thus, Mr. Penry's counsel argued that the jury

should do what in Franklin v. Lynaugh, defense counsel requested that the court instruct the jury to do:

The instructions [Franklin] sought would only have informed the jury that it could answer either or both of the Special Issues "no" if it found that the mitigating evidence justified a sentence less than death--whether or not that evidence was relevant to deliberateness or future dangerousness-- authority the jury assuredly had under the Constitution and under the Texas sentencing scheme as we have previously construed it.

101 L.Ed.2d at 178 (dissenting opinion). Without such an instruction, the Franklin dissenters found that it was only "remotely possible that the jury that sentenced petitioner intuitively understood that possibility...." Id.

In Mr. Penry's case, with defense counsel urging the jury to exercise this option, the possibility that a juror would have done so would seem somewhat greater than in Franklin. However, three

additional factors made the possibility just as remote. In response to the defense argument, the prosecutor explained to the jury that its duty was to follow the law, and the law required that the jurors answer only the three special verdict questions on the basis of the evidence. The law permitted the jury to do nothing else.

[Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly.

(R. 2690).

Second, the prosecutor reminded the jurors that "[y]ou've all taken an oath to follow the law and you know what the law is." (R. 2689). Having been reminded of this oath and of the duty to answer the special verdict questions solely as the evidence required, any juror who might

have initially entertained giving a "no" answer of the sort urged by the defense could reasonably have believed that he or she was prohibited by law and a solemn oath from giving such an answer.

Finally, defense counsel's "arguments ... cannot substitute for instructions by the court," Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978), and the instructions actually given foreclosed any possibility that the jury might engage in the kind of nullification urged by the defense. The instructions directed the jury solely to determine each of the special verdict questions. None of the instructions sought by the defense -- to allow the jury to weigh aggravating and mitigating circumstances or to permit "a discretionary grant of mercy based upon the existence of mitigating circumstances" (R. 2662) -- was given by the trial judge.

In the absence of instructions like these, and in light of the prosecutor's argument and the jurors' oaths, a reasonable juror could have believed that he or she had no vehicle through which to express the view that Mr. Penry should not be sentenced to death.

Because a reasonable juror in Mr. Penry's case could have believed that the evidence of his mental retardation warranted a sentence less than death, yet could also have believed that the instructions precluded the imposition of a life sentence on this basis, the Eighth Amendment cannot tolerate Mr. Penry's death sentence.

## II.

THIS COURT SHOULD REACH THE  
FRANKLIN ISSUE IN THIS CASE AND  
LEAVE QUESTION TWO FOR ANOTHER  
DAY

At this point in Texas, Franklin v.  
Lynnaugh has left capital defendants'

rights "uncertain and insecure." Rescue Army v. Municipal Court, 331 U.S. 549, 572 (1947). Five Justices in Franklin recognized that the application of the Texas death penalty statute could in certain cases violate the Eighth Amendment rule of Lockett v. Ohio, 438 U.S. 586 (1978). Only three Justices, however, concluded that the statute had this effect in Franklin's case. Franklin has thus left the rights recognized by a majority of the Court in an "uncertain and insecure" state. To settle this matter, the Court needs to decide the Franklin issue anew in a case in which the facts demonstrate the constitutional violation. Mr. Penry's case is such a case. If the Court decides the broader issue presented by Mr. Penry's case -- whether the mentally retarded can be subject to the death penalty -- it will likely find that

it need not address the Franklin issue. The Court could very well rule that the mentally retarded cannot be eligible for the death penalty, and on this basis, conclude that Mr. Penry's Franklin issue is moot. See, e.g., Thompson v. Oklahoma, \_\_\_ U.S. \_\_\_, 101 L.Ed.2d 702, 735 (1988) (deciding that the Eighth Amendment prohibited the death penalty for 15-year-olds in states like Oklahoma, making it unnecessary to decide the narrower Lockett issue that was also presented). In the event the Court reaches this conclusion-- as it should if it addresses the retardation issue -- the rights recognized in Franklin will remain uncertain and insecure. Accordingly, to assure that the Franklin rights are not left in this posture, the Court should address only the Franklin issue presented by Mr. Penry.

The settled doctrine that the court "ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable," New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944)), also counsels against reaching the broad prohibition issue. The Court has long sought to "avoid unnecessary, or unnecessarily broad, constitutional adjudication," Thompson v. Oklahoma, 101 L.Ed.2d at 735 (O'Connor, J., concurring), by choosing "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). Accord New York City Transit Authority v. Beazer; Rescue Army v. Municipal Court,

331 U.S. at 569; Burton v. United States, 196 U.S. 283, 295 (1905). The facts of Mr. Penry's case require decision only of the Lockett-Franklin issue and not the broader issue of the prohibition the death penalty for the mentally retarded.

A decision to address only the Franklin issue would not prejudice Mr. Penry or the State. Mr. Penry was sentenced to death in a proceeding in which his mental retardation could not be considered as a mitigating circumstance. If the jury had been able to consider and give mitigating effect to its consideration of his retardation, there is a strong likelihood that he would not have been sentenced to death. By addressing the Franklin issue and leaving the broader issue undecided, the Court can allow a state resentencing proceeding to reach the same result that would be reached for Mr.

Penry if the Court decided that no mentally retarded person should be executed. In the unexpected event that Mr. Penry were resentenced to death in such a proceeding, the Court could then take up the broader mental retardation issue. Thus, from Mr. Penry's perspective, it is unnecessary to decide the broader issue at this time.

Further, it is not necessary to decide the broader issue from the State's perspective. No court in Texas or in the Fifth Circuit has held that the Eighth Amendment precludes the death penalty for the mentally retarded. Accordingly, there is no barrier to implementation of its capital punishment statute which the State presently needs the Court to address.

Accordingly, there is no need to decide, and there are strong reasons not to decide, in Mr. Penry's case, the

broader constitutional issue presented by Question Two. The Court should reach the issue presented by Question One, and reverse the Fifth Circuit on the Franklin issue.

#### CONCLUSION

For all the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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